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No. 99-166

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1999

UNITED STATES OF AMERICA,
Petitioner,

v.

WEBSTER L. HUBBELL,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT

John W. Nields, Jr.*
Laura S. Shores
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

**Counsel of Record*

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QUESTIONS PRESENTED

1. Did Mr. Hubbell have a valid Fifth Amendment privilege relieving him of the obligation to disclose to the government whether he had any of the potentially incriminating documents sought by the subpoena?

2. If Mr. Hubbell had such a valid privilege, could the government compel him to give it up in return for immunity and still use the incriminating documents to build a criminal case against him?

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UNITED STATES OF AMERICA,
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WEBSTER L. HUBBELL,
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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

This case involves an unprecedented use of the immunity power. At the very outset of its investigation, the Office of Independent Counsel ("OIC") served a subpoena on Mr. Hubbell for virtually all of his and his family's business, financial and tax documents. J.A. 46-53.[1] When Mr. Hubbell asserted his Fifth Amendment privilege in response, the OIC overrode the privilege with an order of statutory

[1] "J.A." references are to the separately bound joint appendix. "Pet. App." references are to the appendix to the petition for certiorari. "R." references are to the joint appendix filed in the court of appeals.

immunity under 18 U.S.C. § 6002. J.A. 60-61. And when, under protection of immunity, Mr. Hubbell truthfully disclosed to the Office of Independent Counsel each and every document in his possession called for by the subpoena, J.A. 62-70, the OIC used the documents to develop the case resulting in his indictment.

Because the OIC issued the subpoena at the outset of the investigation,[2] when it did not know what documents Mr. Hubbell had, it could make no claim in the district court that the existence and his possession of the documents were a "foregone conclusion." Consequently, the OIC had to concede on the record in the district court that Mr. Hubbell's Fifth Amendment privilege claim was valid. And because the OIC had conferred immunity at the very outset of its investigation, it was unable to show that the evidence supporting its case was obtained from legitimate independent sources. Instead, the OIC had to concede on the record that it had used the documents to bring the indictment.

We are not aware of any other case in which a prosecutor used the immunity power at the *outset* of its investigation to obtain evidence against the immunized witness himself.[3]

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2 R. 171; Appellees' Brief in the court of appeals ("App. Br.") at 5. We were prepared to prove that the OIC began its investigation by issuing the subpoena at the anticipated *Kastigar* hearing, the need for which was obviated by the OIC's concession that it used the documents to develop evidence against Mr. Hubbell. In any event, the OIC has never contested this.

3 Indeed, we are aware of less than a handful of reported cases in which the government has indicted a witness after he or she produced documents under immunity. *See infra* at page 34 n.37.

1. The Subpoena

The subpoena was issued in November 1996, while Mr. Hubbell was still serving a sentence on an earlier case brought against him by the Office of Independent Counsel. App. Br. at 3. The subpoena called for Mr. Hubbell to produce any of a wide variety of business or financial documents he might have, relating either to himself, his wife, or his children. J.A. 47-49. The subpoena covered the nearly four-year period since Mr. Hubbell had moved to Washington, D.C., and included the time in 1994 and 1995 during which Mr. Hubbell engaged in a sole proprietorship consulting business, entirely on his own. J.A. 46-53.[4]

The subpoena called for Mr. Hubbell to produce, among other things:

> 1. [A]ll documents reflecting, referring, or relating to any *direct* or *indirect sources of money* [including money from clients] to . . . Hubbell, his *wife*, or *children* from January 1, 1993, to the present;
>
> 2. [A]*ll bank records* of Webster Hubbell, his wife, or children . . . from January 1, 1993, to the present;

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4 Mr. Hubbell was an attorney practicing at the Rose Law Firm in Little Rock, Arkansas up until the end of 1992, when he moved to Washington, D.C. *See* Pet. App. 42a; R. 174. From early 1993 until April 1994, Mr. Hubbell was an employee of the United States Department of Justice, serving for most of that time as Associate Attorney General. R. 174. In April 1994, Mr. Hubbell resigned from the Justice Department and engaged in a sole proprietorship consulting business entirely on his own. *Id.* In December 1994, he pleaded guilty to embezzling funds while he had been at the Rose Law Firm. R. 105. He began serving a 21-month prison term in August 1995. R. 175; App. Br. at 3.

3. [A]ll documents . . . relating to *time worked* or billed . . . or relating to expenses incurred . . . .;

4. [A]ny document that would disclose *Webster Hubbell's schedule of activities* from January 1, 1993, to the present;

5. [A]ll documents . . . relating to retainer agreements or contracts for employment;

6. [T]ax returns and tax return information, including form 1099s, schedules, draft returns, work papers, and back-up documents . . . for the tax years 1993 to the present.

J.A. 47-49.

The documents responsive to this subpoena disclosed, among other things, Mr. Hubbell's clients, some of the work he had done for them, and some of the fees received. App. Br. at 4. Some of these fees had been inadvertently omitted from Mr. Hubbell's 1994 tax return. *Id.* Mr. Hubbell, through counsel, informed the OIC that he would assert his Fifth Amendment privilege against self-incrimination in response to the subpoena, and would decline to state what, if any, responsive documents existed. *Id.*

The Office of Independent Counsel accepted the claim of privilege. *Id.* It did not argue that the existence of the documents or Mr. Hubbell's possession of them was a foregone conclusion. Had the matter ended there, the OIC would not have obtained any documents from Mr. Hubbell. However, the Office of Independent Counsel decided to override Mr. Hubbell's self-incrimination privilege with a grant of statutory immunity. *Id.* at 4.

2. The Immunity Order

The OIC obtained an order under 18 U.S.C. § 6003 compelling Mr. Hubbell to produce the documents under protection of immunity. *Id.* The Order, dated November 14, 1996, states, *inter alia*, that "in the judgment of the Office of Independent Counsel, the production of [the] documents by Webster L. Hubbell is necessary to the public interest." J.A. 60. The Order directed Mr. Hubbell to produce the documents and provided: "That Webster L. Hubbell is granted immunity to the extent allowed by law." J.A. 61.

On November 19, 1996, Mr. Hubbell appeared before the grand jury. J.A. 62-70. He asserted his Fifth Amendment privilege, and declined to state whether any responsive documents existed.[5] Immunity was then conferred, and he was directed to produce responsive documents. J.A. 63-64.

Mr. Hubbell produced 13,120 pages of financial and tax records and appointment calendars, including: documents identifying his clients in 1994 and 1995; documents showing what work he had performed for some clients; documents reflecting fees they paid; and documents showing the lower fee income reported on the 1994 tax return. Pet. App. 113a; R. 178. The documents also showed that the Hubbells had paid only part of their reported 1994 tax liability. App. Br. at

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[5] *See* J.A. 62 (Mr. Hubbell's testimony before the grand jury). Thus, when asked to produce documents responsive to the subpoena, Mr. Hubbell stated:

> Based on my Fifth Amendment privilege against self-incrimination and on advice of counsel, I decline to state *whether there are* documents, within my possession, custody or control responsive to the subpoena.

Id. (emphasis added).

5. Numerous other documents related to Mr. Hubbell's children, his wife, and family financial transactions.

The OIC then required Mr. Hubbell to make explicit the testimony which is often only implicit in a document subpoena context. It compelled Mr. Hubbell truthfully to state in the grand jury, in response to questions concerning *each* specification in the subpoena, whether he had produced *all* of the responsive documents in his custody or control. *See* J.A. 62-70. For example:

> Q. . . . Now paragraph A of the Subpoena Rider, I am going to summarize this, but it says "Any and all documents reflecting, referring, or relating to any direct or indirect sources of money or other things of value received, provided to you, your wife, or children from January 1st, 1993 to the present, including the identity of employees, clients, legal or other type work." Did you provide all those documents pursuant to this Subpoena?
>
> A. Yes.

J.A. 65. Similar questions were asked and answers given for all eleven specifications in the subpoena. *Id.* at 65-70. And Mr. Hubbell was asked to state that he understood the concept of "constructive possession" and to affirm that he had produced all responsive documents in his constructive possession. *Id.* at 67.

3. The Indictment

Prior to the receipt of these documents the OIC knew little if anything about the Hubbells' 1993-96 financial affairs, his clients, his sources of money, or his taxes. Using these documents as the starting point, the OIC identified and subpoenaed Mr. Hubbell's clients, inquired into the work he

had done for them, and conducted a thorough investigation of Mr. Hubbell's and his family's financial and tax affairs.[6] Initially, the OIC was hoping to show that clients were paying fees to influence his testimony.[7] But, looking through the documents, the OIC investigated several other possible criminal theories, including whether Mr. Hubbell failed to report all of his income on his tax returns or failed to pay the tax due. Finally it brought this indictment charging Mr. Hubbell with underreporting his 1994 income; and charging Mr. Hubbell, his wife, and two tax professionals with evasion of the obligation to pay the taxes that had been reported. J.A. 9-44.

4. The Motion to Dismiss

Mr. Hubbell filed a pre-trial motion in the district court to dismiss the indictment on the ground that it had been built with evidence obtained by the OIC as a result of truthful and honest disclosures Mr. Hubbell had made under protection of immunity. R. 164. In response, the OIC affirmatively agreed that Mr. Hubbell had had a Fifth

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[6] In response to questions from the district court, counsel for the Office of Independent Counsel stated:

> [W]e *could* have gotten a Dun & Bradstreet on him. We *could* have found out what his bank records were. We *could* have gone and subpoenaed all the individual banks for their records. We *could* have gone to the papers that he filed with the IRS. We *could* have gone to the accountant. We *could* have gone to his credit card companies . . . . We could have gotten every one of these things.

J.A. 90. But the OIC also conceded that it had done none of these things prior to the subpoena, explaining "We do not have to do it in that order, Judge." *Id.*

[7] *See* J.A. 92. But that was not the case and no such charges were ever brought.

Amendment right not to produce the subpoenaed documents. The OIC said in its brief to the district court:

> *Doe* and *Fisher* make it clear that because of these three 'testimonial aspects of production' [existence, possession and authentication] an individual who receives a Federal grand jury subpoena that commands him to produce business records may assert his Fifth Amendment privilege against self-incrimination.[8]

The Office of Independent Counsel also wrote:

> For the purposes of this motion there is no factual dispute. Moreover, the legal dispute is limited. Both parties agree an individual can respond to a subpoena commanding business records by asserting his privilege against self-incrimination.[9]

The OIC also conceded—as it does here[10]—that it had used the documents whose existence Mr. Hubbell had disclosed under the immunity order to build the case resulting in the indictment. R. 300. It told the district court that it "would make no bones about the fact that [it] did use the information provided by Mr. Hubbell pursuant to the production immunity." R. 475.

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8 R. 303. The OIC conceded that it could not have obtained the documents by search warrant, because it lacked probable cause. J.A. 89.

9 *Id.* at 311-12.

10 *See* OIC Br. at 3. Because the OIC conceded this issue below, no *Kastigar* hearing was held, and the details of the OIC's use of the documents are not developed in the record.

The OIC's position in opposition to the motion to dismiss in the district court was that it could override Mr. Hubbell's concededly valid claim of privilege with a grant of immunity, and still use the documents to prosecute him. R. 300. The district judge rejected that argument as inconsistent with *Kastigar* and dismissed the indictment. Pet. App. 137a. The judge also addressed a question not directly raised by the OIC, and found that the OIC had not shown that the existence of the "documents or their contents was a 'foregone conclusion.'" Pet. App. 134a.[11]

5. The Appeal

On appeal, the OIC argued for the first time that Mr. Hubbell had no Fifth Amendment privilege, urging that the existence and possession of business records by *any* businessman is a foregone conclusion.[12] Second, the OIC argued, as it had in the district court, that it could displace the Fifth Amendment privilege with an immunity order, and still use the documents against the immunized witness.

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11 The OIC never asserted in the district court that existence and possession of the subpoenaed records were a "foregone conclusion." Indeed, as already noted, the OIC expressly conceded that Mr. Hubbell had a valid Fifth Amendment right not to produce the documents. However, the district court inquired briefly into the OIC's knowledge of Mr. Hubbell's records at oral argument of the motion to dismiss. The attorney for the Office of Independent Counsel said that the OIC "could have gotten a Dun & Bradstreet on Mr. Hubbell, subpoenaed the individual banks . . . gone to the papers he filed with the IRS . . . the accountant . . . [and] his credit card companies." J.A. 90. But they had not done this, and the district court found "the assertion of counsel does not begin to show that the Independent Counsel's knowledge of the documents or their contents is a 'foregone conclusion.'" Pet. App. 134a.

12 OIC's Brief in the court of appeals at 25, 34, 39-40.

The panel addressed both issues. First, following this Court's decisions in *Fisher* and *Doe I*, the panel noted that the Fifth Amendment applies to document subpoenas because compliance may involve "testimony" as to existence, possession, or authenticity of the documents produced. Pet. App. 31a-32a. The Court held further, also relying on *Fisher* and *Doe I*, that where existence and possession are a foregone conclusion, insufficient testimony is involved, because the government is not relying on the witness' "truthtelling" to secure the evidence it seeks. Pet. App. 34a. The court then reviewed the court of appeals decisions applying the "foregone conclusion" exception, and concluded that in order to fall within the scope of that exception, the government must show that it knew with "reasonable particularity" of the existence of the subpoenaed documents and the defendant's possession of them before issuing the subpoena. Pet. App. 39a-42a, 52a-58a, 62a.

The court then rejected the OIC's position that — even where the Fifth Amendment privilege does apply — the government may override that privilege with a grant of statutory immunity and still use the documents to prosecute the witness. According to the court, *Kastigar v. United States*, 406 U.S. 441 (1972), ruled that result out, holding as it does that a statutory immunity order must leave "'the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege.'" Pet. App. 65a (quoting from *Kastigar*, 406 U.S. at 462).

The court then remanded the case to permit the OIC to develop the record regarding its prior knowledge of Mr. Hubbell's records, and for the district court to apply the "reasonable particularity" standard to the facts developed in that record. Pet. App. 72a.

The full court of appeals denied rehearing *en banc*: four of the eleven judges in active service voted to rehear the case, five voted against and two recused themselves. *Id.* at 142a-143a.

Thereafter, Mr. Hubbell agreed to plead to a misdemeanor covering some part of the conduct alleged in the indictment. J.A. 104-14. He received an agreed upon sentence of no prison and no fine; and the charges against his wife and the two tax professionals were dropped. *Id.* at 106-09. Under the plea agreement the misdemeanor plea will be set aside and the charge dismissed against Mr. Hubbell unless this Court reverses the decision below in a manner that would have made the case prosecutable. *Id.* at 106-07.[13]

The Office of Independent Counsel then filed a petition for a writ of certiorari with this Court. The petition was granted.

SUMMARY OF THE ARGUMENT

The immunity statute was never designed to be used as a means for obtaining evidence against the person who is immunized. The statute was designed to permit a prosecutor to compel evidence from the immunized witness to be used against *others*, ideally with a minimum of damage to the prosecution's case against the immunized witness.[14] This

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[13] In light of the plea, no further record will ever be developed on the issue of the OIC's prior knowledge of Mr. Hubbell's records. The OIC made no effort to satisfy the foregone conclusion test the first time the case was in the district court. And, the OIC has conceded its inability to meet the "reasonable particularity" standard described in the Court of Appeals opinion. OIC Br. at 7.

[14] *See infra* at 17 n.15.

Court in *Kastigar v. United States*, 406 U.S. 441 (1972), emphatically held that the prosecution cannot use the immunity statute as a way of improving its case against the immunized witness.

The OIC's position, if accepted, would permit prosecutors all over the country to compel testimony under immunity as a way of obtaining evidence against the immunized witness. It is appropriate to view this position, then, with a reasonable degree of skepticism. And as it turns out, the position is impossible to square with basic principles of Fifth Amendment and immunity jurisprudence.

1. The Fifth Amendment Privilege: the Importance of Testimony

The Fifth Amendment privilege applies to document subpoenas because compliance will usually involve *testimony*. This Court's decisions in *Fisher v. United States*, 425 U.S. 391, 410 (1976), and *United States v. Doe*, 465 U.S. 605, 617 (1984) ("*Doe I*"), explain that responding to a document subpoena involves testimony because "compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control" by the witness.

As Wigmore put it, a subpoena *duces tecum* constitutes "process relying on the [witness'] moral responsibility for truthtelling." 8 John H. Wigmore, *Evidence* § 2264, at 379 (1961). Every witness receiving a subpoena *duces tecum* is being asked to tell the government what documents (or things) he has that are responsive. If the witness produces nothing in response, he is representing that he has nothing responsive. If he produces one piece of paper, he is representing that it is responsive, and that he has nothing else responsive. These representations are ordinarily made by *conduct*, and not in words, but they are nonetheless

testimonial under *Fisher* and *Doe I*. These representations are important because the government will generally only receive the incriminating documents it seeks if the witness' representations in response to the subpoena are truthful, *i.e.*, if he truthfully and honestly discloses the responsive documents that he has.

To be privileged, this testimony need do no more than tell the government what incriminating documents the witness has. It has been settled and oft-repeated Fifth Amendment law for over a century that a person may not be compelled to make disclosures which—though innocuous in themselves—would *lead* the government to obtain other evidence which would incriminate. *E.g.*, *Counselman v. Hitchcock*, 142 U.S. 547, 585-86 (1892); *Doe v. United States*, 487 U.S. 201, 208 n.6 (1988) ("*Doe II*").

The government's briefs struggle to discern some more complex testimonial aspect to the act of producing documents. But the Fifth Amendment applies for a simple and straightforward reason. The act of producing the documents tells the government what documents exist. And the government will not obtain incriminating evidence to use against the witness if the witness responds untruthfully and fails to produce responsive documents. It is only the witness' truthful testimony, admitting to the documents he has, that will lead the government to obtain the incriminating evidence.

Thus, subject to the foregone conclusion exception, discussed *infra*, a witness who receives a subpoena for potentially incriminating documents may assert his Fifth Amendment privilege in response, and may decline to inform the prosecution what responsive documents, if any, exist and are in his possession. That is the teaching of *Fisher* and *Doe I*. The Office of Independent Counsel was right to concede this expressly in the district court.

2. The Effect of Immunity in the Context of a Document Subpoena

If a witness has a valid Fifth Amendment privilege, and is compelled to disclose the existence of incriminating evidence to the government under *immunity*, the prosecution cannot use that evidence to build a case against the witness. The evidence is *derived from* the compelled testimony, because the government only receives the evidence if the witness responds truthfully to the subpoena.

The immunity statute and this Court's decision in *Kastigar v. United States*, 406 U.S. 441 (1972), are emphatic on this point. The statute prohibits the prosecution not only from using testimony compelled under immunity. It also forbids use of "any *information directly or indirectly derived from* such testimony." 18 U.S.C. § 6002 (emphasis added). This Court upheld the statute against constitutional challenge in *Kastigar* precisely because the statute prevents prosecutors from using "evidence derived from" the compelled testimony. 406 U.S. at 442. This Court recognized that the privilege protects "disclosures that the witness reasonably believes could be used in a criminal prosecution or could *lead* to other evidence that might be so used," *id.* at 445 (emphasis added). The witness is accordingly guaranteed that immunity will "leave[] the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege," and the privilege had been honored. *Id.* at 462.

It is fruitless to argue, as the Office of Independent Counsel and the Department of Justice do, that the documents whose existence Mr. Hubbell disclosed under immunity may be treated as though they had come to the government like "manna from heaven." OIC Br. at 7; DOJ Br. at 25. They did not come to the government like "manna from heaven." Instead, the OIC obtained the potentially

incriminating documents because it compelled Mr. Hubbell *under immunity* to tell it of every single document he had which was responsive to the subpoena. The OIC obtained the documents only because, *under immunity*, Mr. Hubbell responded truthfully. The evidence was obtained through compelled immunized testimony and it is hopelessly tainted.

This Court made it ringingly clear that *immunized document productions* will have serious taint implications. In *Braswell v. United States*, 487 U.S. 99 (1988), this Court said:

> if the Government has any thought of prosecuting the custodian, a grant of act of production immunity can have *serious consequences*. Testimony obtained pursuant to a grant of statutory use immunity may be used neither *directly nor derivatively* [citing *Kastigar*].

Id. at 117 (emphasis added).

The OIC proceeded heedless of these warnings. Instead of balancing the need for obtaining evidence against someone *else*, on the one hand, against the risks to any prosecution of Mr. Hubbell, on the other, the OIC used the immunity power to get evidence from Mr. Hubbell *to use in prosecuting him*.

Simply put, because Mr. Hubbell was truthful in telling the grand jury *under immunity* what documents he had, he got himself indicted. This cannot be squared with this Court's decisions on immunity or the Fifth Amendment.

3. Foregone Conclusion

Both the OIC and the Department of Justice offer the position at the end of their briefs that the existence and

possession of business and financial records are always a foregone conclusion, and therefore that Mr. Hubbell never had a valid Fifth Amendment claim in the first place.

We submit that this position should be rejected. First, the position was vigorously waived below by the OIC. Second, the position is identical to one taken unsuccessfully by the Department of Justice in *Doe I*. And third, the position is inconsistent with *Fisher* and *Doe I* because, if accepted, it would frequently permit the compelled production of documents even though the government was relying heavily on the truthtelling of the witness to obtain the documents.

Prosecutors have often been able to meet the "reasonable particularity" standard adopted by the Second Circuit and endorsed by the court below. There is no reason to disturb it—particularly not in this case.

ARGUMENT

The Office of Independent Counsel began its investigation of Mr. Hubbell by compelling him to disclose under statutory immunity what documents he had that were responsive to the very broad subpoena. When he did so truthfully, it then used those documents to build a criminal case against him. No prosecutor has ever done this before. And if this Court were to endorse what was done in this case, any prosecutor in the country could pick out a subject, compel the subject truthfully and honestly to disclose all of his personal and business documents, financial and tax, whether potentially incriminating or not, and then pore through those documents to see if some crime or another is suggested in them.

The immunity statute was never designed as a way for a prosecutor to obtain evidence against the immunized witness. The immunity statute was designed to permit a prosecutor to obtain evidence from the immunized witness to be used against *others*.[15] If a person's Fifth Amendment privilege places evidence beyond a prosecutor's reach, this Court's decision in *Kastigar* makes it absolutely clear that the prosecutor may not use the immunity statute to obtain that evidence from the person and use it against him.

Here, the OIC conceded that Mr. Hubbell had a valid Fifth Amendment right not to disclose what documents he had. As we show below, this was a concession compelled by this Court's document subpoena decisions. The OIC then used the *immunity statute* to obtain the documents and used the documents to build a criminal case against Mr. Hubbell.

This cannot be done consistent with settled principles of Fifth Amendment and immunity jurisprudence. The Fifth Amendment applies because compliance with a document subpoena involves "testimony": a subpoenaed witness must tell the government what documents he has that are responsive. The government only gets the incriminating evidence it seeks if the witness' "testimony" is truthful: it is the truthful disclosure by the witness of the existence of each of the responsive documents that leads the government to obtain the documents. Consequently, if the witness is

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15 *See* S. Rep. No. 91-617 (1969), at 55; *Hearings on H.R. 11157 and H.R. 12041 to Amend Title 18, United States Code, to Prescribe the Manner in Which a Witness in a Federal Proceeding May Be Ordered to Provide Information After Asserting His Privilege Against Self-Incrimination and to Define the Scope of the Immunity to Be Provided Such Witness with Respect to Information Provided Under an Order*, 91st Cong. 31 (1969) (statement of Mr. Poff) (discussing similarly worded predecessor bill).

compelled to testify, *under immunity*, to what documents he has, the documents are tainted.

I. THE FIFTH AMENDMENT PRIVILEGE: SUBPOENAS *DUCES TECUM*

A. The Fifth Amendment Privilege Applies Because Compliance with a Subpoena *Duces Tecum* Involves *Testimony*

The Fifth Amendment to the United States Constitution provides in part "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This language does not prohibit all forms of compulsion on an accused. This Court has long held that it applies only to compelled "testimony," *i.e.*, direct or implicit assertions involving the obligation to tell the truth. *E.g.*, *Pennsylvania v. Muniz*, 496 U.S. 582, 597 (1990) (any compelled "assertion of fact" forcing a choice between "truth, falsity or silence" "contains a testimonial component").[16] The critical issue therefore is what "testimony" is compelled from a person who must respond to a grand jury subpoena for potentially incriminating documents or other physical evidence.

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16 Thus, the privilege does not apply to an order compelling the accused to give blood samples, *Schmerber v. California*, 384 U.S. 757, 763-64 (1966), handwriting exemplars, *Gilbert v. California*, 388 U.S. 263, 265-67 (1967), voice exemplars, *United States v. Wade*, 388 U.S. 218, 222-23 (1967), or to don a blouse, *Holt v. United States*, 218 U.S. 245 (1910), because none of these orders depends for its effectiveness on the accused's truthtelling.

This Court addressed this issue directly in *Fisher*, 425 U.S. at 409.[17] In *Fisher*, the lower courts and the parties had focused on issues of authorship of the documents and personal privacy suggested in *Boyd v. United States*, 116 U.S. 616 (1886). Addressing those issues, the Court in *Fisher* first held that the fact that a document responsive to the subpoena had the subject's writing on it was essentially irrelevant to the analysis. The Court pointed out that the document had been created voluntarily, and that a document subpoena does not call on the subject "to restate, repeat, or affirm the truth of the contents of the documents sought." 425 U.S. at 409. The Court stated, therefore, that:

> The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else.

Id. at 410.

In so ruling, this Court laid to rest suggestions in *Boyd* and subsequent cases that the Fifth Amendment might protect an accused's private papers even if obtained without compulsion on the accused. The Court in *Fisher* held dispositively that *contents* of voluntarily created documents are not privileged. This ruling in *Fisher*, repeated in *Doe I*, 465 U.S. at 610-11, is a *significant* part of our Fifth Amendment jurisprudence. It means that a search warrant for a person's private papers does not implicate the Fifth Amendment, *see Andresen v. Maryland*, 427 U.S. 463 (1976); it means that a subpoena to a third party for the

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17 The Court stated at page 409 of the *Fisher* opinion: "we turn to the question of what, if any, incriminating *testimony* within the Fifth Amendment's protection, is compelled by a document summons." (emphasis added).

subject's private papers does not implicate the subject's Fifth Amendment privilege, *Fisher*, 425 U.S. at 398-99; and it means that a subpoena addressed to the subject himself does not implicate Fifth Amendment rights when existence and possession of those documents are a foregone conclusion. *Id.* at 411.[18]

The *Fisher* Court went on to state, however, that the act of producing evidence *does* in many cases involve testimony. Thus, the Court states:

> The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer.[19]

In *Fisher*, the existence and location of the documents were undisputed,[20] and thus, under the facts of that case, compliance was held not to involve testimony as to existence or possession. *Id.* at 411. In *Doe I*, 465 U.S. at 614 n.13,

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18 The proposition that the *contents* of pre-existing documents are not privileged places a subpoena for documents on exactly the same footing as a subpoena for any other type of physical evidence. *Fisher* makes this point expressly, saying: "In the case of a document subpoena the only thing compelled is the act of producing the document and the compelled act is the same as the one performed when *a chattel* or document not authored by the producer is demanded." 425 U.S. at 410 n.11 (emphasis added).

19 *Id.* at 410. The Court also ruled that compliance may tacitly authenticate the documents. *Id.* at 410-11.

20 We discuss the foregone conclusion exception at greater length at pp. 35-41 *infra*.

however, the Court pointed out that "[r]espondent did not concede" existence or possession, and ruled that the act of producing documents in response to the subpoena was "privileged" and that it "cannot be compelled without a statutory grant of use immunity pursuant to 18 U.S.C. §§ 6002 and 6003." *Id.* at 617.

Thus, under the reasoning of *Fisher* and the holding of *Doe I*, compliance with a subpoena for documents, or other physical evidence, will compel the witness to give "testimony," unless the existence and his possession of the thing demanded are a foregone conclusion, because compliance requires the witness to tell whether he has the thing demanded (*i.e.*, whether it exists and is in his possession). This "testimony" is important in the document subpoena context, because the government will only receive the incriminating things demanded if the witness "testifies" truthfully about what he has.

As Wigmore put it,[21] the Fifth Amendment applies to a subpoena *duces tecum* because it constitutes "process relying on the witness' moral responsibility for truthtelling." 8 John H. Wigmore, *Evidence*, § 2264, at 379 (1961). A witness receiving a subpoena for an incriminating document or other item of physical evidence is required by law to tell the government whether he has it. Normally, the witness does this implicitly, by conduct. Thus, a witness bringing nothing in response to a subpoena is implicitly representing that he has nothing responsive to the subpoena; and one bringing a single document in response is implicitly representing that the document he brings is responsive to the subpoena, and that he has nothing else responsive to the subpoena. Sometimes, as in this case, the witness is asked

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21 Wigmore was cited and relied on by this Court in *Fisher*. 425 U.S. at 411.

to make an express representation that what he produced is everything he has that is responsive.[22] However, in either event, the witness is making such a representation. And the prosecutor's ability to receive the incriminating evidence demanded in the subpoena is dependent on the witness' representation being truthful and honest.

Under this Court's decisions, responding to a subpoena calling for a document of a particular description is no different from responding to an oral question inquiring about the existence and location of a document of that same description. Responding to the subpoena and responding to the oral question both involve "testimony"; and a truthful response will, in either case, lead the government to obtain the document. One situation involves testimony by conduct, and the other involves testimony in words. But the Fifth Amendment privilege does not distinguish between the two. Thus, this Court said in *Doe II* "[p]etitioner has articulated no cogent argument as to why the 'testimonial' requirement should have one meaning in the context of acts, and another meaning in the context of verbal statements." 487 U.S. at 210 n.8.

Consider a case in which the government compels a witness under immunity to admit through oral testimony that an incriminating document exists and to disclose its whereabouts. Assume that the government then goes and gets the document. We believe all would agree that the witness has given "testimony" and that the document is evidence derived from that testimony.[23] How then, is it

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22 *See* J.A. 62-70 (lengthy questioning of Mr. Hubbell in the grand jury).

23 It would be interesting to know if the government would agree. We note, of course, that the contents of the document, in this example, would not be "privileged." But the document would be tainted, and could not be used.

different if the government served a subpoena on the witness for the document, similarly requiring the witness to tell if the document exists, and if it does, requiring the witness to bring the document in himself? In each case, the witness had two choices: to respond truthfully and risk losing his liberty, or to respond untruthfully and go free. This is the Fifth Amendment dilemma. Under the Fifth Amendment we do not compel a truthful response, and we do not permit a dishonest one. We extend the privilege of silence.

The OIC and especially the Department of Justice strain to picture the *act* of producing documents as being purely a physical act not involving testimony. The Department of Justice says that so long as the documents were voluntarily created, "transfer of possession does not, *in and of itself*, involve any form of compelled testimony."[24] But this statement is contrary to this Court's decisions in *Fisher* and *Doe I*. Under those cases, it is through the act of producing, or not producing, a document — *and only through that act* — that a witness tells the government that he has or does not have the document. And in *Fisher* and *Doe I*, this Court made clear that the act of transferring possession, *in and of itself*, often does involve "testimony." Thus, in *Fisher*, the Court said, "[I]n the case of a documentary subpoena *the only thing compelled* is the *act of producing* the document . . . ." *Id.* at 410 n.11 (emphasis added). The Court held "the act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own . . . . [It] concedes the existence of the papers demanded and their possession or control by the taxpayer." *Id.* at 410. Similarly, in *Doe I*, the Court confirmed that a government subpoena "compels the holder of the document to perform *an act* that may have testimonial

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24 DOJ Br. at 12 (emphasis added). The Department reiterates later in its brief that, "[s]urrender of pre-existing physical evidence is not in and of itself a testimonial act . . . ." *Id.* at 26.

aspects," and then held "[t]he *act* of producing the documents at issue in this case is privileged . . . ." 465 U.S. at 612, 617 (emphasis added).[25]

Under this Court's decisions the *act* of producing documents in response to a subpoena, is in and of itself, testimonial, in many cases. Only when the existence and possession of the thing demanded are a foregone conclusion does the *act* lose its testimonial component. Otherwise, the *act*, in and of itself, is the way in which the witness tells the government what responsive documents he has.[26]

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25 The OIC compounds its misreading of *Fisher* and *Doe I*, saying:

> The government obtains that information directly from the physical act of production — an act that the Fifth Amendment does not protect — and it is in no sense derived from respondent's compelled testimony.

OIC Br. at 12. But *Fisher* and *Doe I* make clear that the Fifth Amendment *does* protect the *act* of production.

26 The *Schmerber* case upon which the OIC relies, 384 U.S. 757, is different on this critical element of testimony. *Schmerber* involves taking a blood sample from an accused. In the case of a blood sample, the government's ability to obtain the evidence it seeks is in no way dependent on the truthtellling of the accused. No testimony is involved. In the case of a subpoena *duces tecum*, the government *is* dependent on the witness' truthtelling. If the witness falsely denies possession of any responsive documents, the government gets nothing. *See generally* discussion of non-testimonial compulsion cases in *Fisher*, 425 U.S. at 405-09; and *Doe II*, 487 U.S. at 211 n.10 (explaining distinction between "being compelled himself to *serve as* evidence and . . . being compelled to *disclose or communicate* information or facts that might serve as or lead to incriminating evidence") (emphasis added).

B. To Be Privileged, the Testimony Involved in Complying with a Subpoena for an Incriminating Document Need Only Lead the Government to Obtain the Document

To be privileged, the "testimony" need do no more than lead the government to obtain the evidence. This Court's decisions hold that testimony that is innocuous in itself is nonetheless privileged if it will lead the government to other evidence that will incriminate. In *Counselman v. Hitchcock*, 142 U.S. 547, 585-86 (1892), this Court held that a person is privileged not to "disclose . . . the sources from which" incriminating "evidence . . . may be obtained."[27] This bedrock proposition of Fifth Amendment law was repeated and reaffirmed by this Court in *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964); and *Kastigar*, 406 U.S. at 454. More recently, in *Doe II*, 487 U.S. at 208 n.6, the Court stated simply "the 'compelled testimony' need not itself be incriminating if it would lead to the discovery of incriminating evidence."[28]

Nothing more is required for the privilege to apply: only that the testimony will lead the government to obtain other incriminating evidence. Since the government will only obtain the incriminating documents in response to a

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27 It was from this fundamental tenet of Fifth Amendment law that the Court reasoned an immunity statute had to protect not only against direct use of compelled testimony, but also against "that use of compelled testimony which consists in gaining therefrom . . . sources of information which may supply other means of convicting the witness . . . ." *Id.* at 586.

28 *See also* Wigmore, *supra*, § 2260, at 371-76; *Ullman v. United States*, 350 U.S. 422, 437 (1956).

subpoena *duces tecum* if the witness truthfully discloses the documents that he has, those documents are clearly evidence *derived from* the testimony.

The OIC and the Justice Department argue that the only important testimony involved in subpoena compliance is testimony that tells the government something *about* the document—something the government could not learn by reading it.[29] But it was testimony of the documents' *existence* on which *Fisher* focused first. And, as just noted, the Fifth Amendment applies to testimony that leads the government to evidence, even if the testimony does not explain that evidence in any way.

C. Subpoenas *Duces Tecum* Involve Core Fifth Amendment Issues, Not Just Tangential Ones

Compliance with subpoenas *duces tecum* raise core Fifth Amendment issues, not just tangential ones. Asking a subject to disclose whether an incriminating item of physical evidence exists and is in his possession will frequently put that subject to the same choice as asking him whether he committed the crime. The choices in each case will be: tell the truth and lose your liberty, or falsify and go free. Under the Fifth Amendment's privilege against self-incrimination, we relieve people from this choice and permit them the option of silence.

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29 *See* DOJ Br. at 17 ("the producer's implicit representation that a particular document falls within the scope of the subpoena . . . may assist the government or the trier of fact in interpreting a document that is ambiguous"). The OIC insists that the privilege should apply only in cases in which the witness' production of the documents might be used to prove the witness's knowledge of their contents. OIC Br. at 21-22.

At its core, the Fifth Amendment relieves a person of his obligation to tell the truth when the truth will result in loss of liberty or life. — The Fifth Amendment does not permit a person to lie. It simply permits the person to be silent. — But it relieves him of the choice between telling the truth and going to jail on the one hand, and committing the crime of falsification on the other. That is the irreducible minimum thing that the Fifth Amendment *does*. In this country, we do not "subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt." *Murphy v. Waterfront Commission,* 378 U.S. at 55; *Doe II,* 487 U.S. at 212; *Pennsylvania v. Muniz*, 496 U.S. at 597.[30]

This core protection can be brought into play as starkly in a document subpoena context as in an oral interrogation context. Consider a subpoena to a murder suspect for any letters from the victim in his possession. Assume that that there is a circumstantial case against the suspect but no evidence connecting the suspect and the victim. Assume further that the letters are under the suspect's control and disclose a motive for the crime. A subpoena compelling him to state whether he has the letters, and requiring him to produce them, could force him to choose between truthfully admitting possession and certain incarceration or execution, on the one hand, or falsely denying possession and escaping on the other. This is the prototypical Fifth Amendment choice, presented as starkly as though he had been asked simply if he had committed the

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30 *See* Bernard P. Meltzer, *Required Records, The McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. Chi. L. Rev. 687, 692, 701 (1951) (explaining the difficulty of the choice on the ground that ". . . the law of self-preservation commands perjury or disobedience." "[The Fifth Amendment] is a reflection of the law's unwillingness to command the impossible, of its respect for the law of self preservation. . . ." "The application of the privilege to documents may reflect the same unwillingness to command the impossible, which is the most intelligible basis for the application of the privilege . . . .").

murder. The Fifth Amendment would free him from this choice.[31]

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31 As one commentator put it, the Fifth Amendment applies in full force to compelled production of an incriminating document *if the government does not already know of its existence*:

> [T]here, the suspect's choice is much the same as the choice he faces when questioned directly. In Part II, I argued that there are two very different categories of documents — those that the government can obtain only by subpoena because probable cause is absent [and it cannot be obtained by search warrant], and those the government can obtain with or without the defendant's cooperation. Start with the first category, and imagine a case in which police have only a bare suspicion that the incriminating document exists and is in the suspect's possession. Here, a subpoena for the document puts the suspect in precisely the same position as would an incriminating question on the witness stand. The only honest response would be to turn over the document, but that would add substantially to the government's case against the suspect. This gives rise to a strong incentive to be overtly dishonest since passivity is no longer an option.
>
> Not surprisingly, the Fifth Amendment protects the suspect in these circumstances, even after *Fisher* and *Doe*. By producing a document, the suspect implicitly testifies to its existence and authenticity and his own possession of it. Where those matters are at issue, *Fisher* and *Doe* establish that the government cannot compel production without an appropriate grant of immunity. In the example just discussed, the existence of the incriminating document is not a "foregoing conclusion"; consequently, the document need not be produced. In addition, while the government may immunize the act of production and thereby compel the suspect to turn the document over, the grant of immunity must as a practical matter cover the document's *contents*, since only in that way can the government ensure that it gains nothing from the disclosure of the document's existence.

William J. Stuntz, *Self-Incrimination and Excuse*, 88 Colum. L. Rev. 1227, 1278 (1988) (footnotes omitted).

Mr. Hubbell, too, was privileged not to tell the OIC whether he had in his possession records, which, among other things, reflected more income than was on his tax return. The Fifth Amendment relieved him of the choice between honestly responding to the subpoena, on the one hand, and withholding the incriminating documents on the other. The Fifth Amendment relieved him of this choice by permitting him not to produce the documents.

II. IMMUNITY BARS USE OF THE DOCUMENTS TO INCRIMINATE MR. HUBBELL

The Office of Independent Counsel's position on immunity is equally inconsistent with this Court's decisions. Its fundamental position is that it can force Mr. Hubbell honestly to respond to the subpoena, and then use his honest responses to prosecute him a second time and send him back to jail. This position is hopelessly at odds with the immunity statute and this Court's cases interpreting it.

The immunity statute states in the clearest possible terms that it forbids use not only of the compelled testimony (here the act of production), but any information *derived* from the compelled testimony. The statute commands:

> [N]o testimony or other information compelled under the order (*or any information directly or indirectly derived from such testimony or other information*) may be used against the witness in any criminal case . . . .

18 U.S.C. § 6002 (emphasis added). The statute's protection of evidence derived from the compelled testimony was

critical to its constitutionality. This Court made this plain in *Kastigar*.

In upholding the statute against a challenge that it did not adequately supplant the privilege, the Court in *Kastigar* emphasized that the immunity statute prevents prosecutors not only from using the compelled testimony, but also from using "evidence derived from" the testimony. 406 U.S. at 442. The compelled testimony cannot lead to "other evidence" to be used against the witness, *id.* at 445; indeed, it cannot be used "in *any* respect." *Id.* at 453. The point, according to *Kastigar*, is that the testimony "can in no way lead to the infliction of criminal penalties" on the witness. *Id.* at 461. The witness is guaranteed that immunity will "leave[] the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege," and the privilege had been honored. *Id.* at 462. Because the statute confers protection as broad as the privilege it displaces, its constitutionality was sustained.[32]

The briefs of the OIC and the Department of Justice ignore *Kastigar* and its obvious implications for this case. The OIC reverts to the unexceptionable proposition that the *contents* of the documents (*i.e.*, the words written on them) are not compelled, and consequently that the contents are not "privileged." But this does not take the OIC very far.

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[32] Congress once enacted an immunity statute that only protected the privileged testimony itself—providing for use immunity but not derivative use immunity. But this Court struck that statute down as unconstitutional. *Counselman v. Hitchcock*, 142 U.S. at 585. The OIC's position that only the compelled act of production should be protected, but not the documents it obtained as a result, is an effort to rewrite the current "use and *derivative* use" immunity statute and make it a "use only" statute like the one held unconstitutional in *Counselman*.

As Mr. Justice Scalia, while a Judge in the D.C. Circuit Court of Appeals, stated in response to a contention that because the *contents* of documents compelled under immunity are "unprivileged" they can be used against the immunized witness:

> The flaw in this reasoning is that the fact that the contents of the tapes are *unprivileged* does not mean that they will necessarily remain *untainted*. If the government prosecutes [the witness] in the future it will have to meet the "heavy burden," *Kastigar* 406 U.S. at 461, of proving that all evidence it seeks to introduce is untainted by the immunized act of production.

In re Sealed Case, 791 F.2d 179, 182 (D.C. Cir.), *cert. denied*, 479 U.S. 924 (1986).

The point is a simple one. Under the current immunity statute and *Kastigar*, protection is given to more than just the "privileged" testimony itself. Protection is given, as it must be, to other evidence (including physical evidence) which is not "privileged," but to which the government is led by the testimony.[33]

Thus, if a witness were compelled to give testimony under immunity (or a confession were coerced) disclosing the

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[33] The Department of Justice argues that this Court rejected this proposition in *Doe I*. DOJ Br. at 19 (citing *Doe I*, 465 U.S. at 617 n.17). But the Court there was careful to specify that a grant of immunity in connection with a document subpoena must protect the witness "from the self-incrimination *that might accompany* the act of producing" documents. *Id.* (emphasis added). Our position is that where the "testimony" compelled by the act of production is that the responsive documents exist, the documents are tainted.

whereabouts of a body, a murder weapon, or an incriminating document, the prosecution would be forbidden from using these items of evidence against the accused, unless it could prove that it was led to them by a legitimate independent source.[34] This is true not because these items are "privileged"; they are not. It is true because they are *tainted* by compelled testimony. [35]

Any doubt that *Kastigar*'s principles apply in full force to the immunized production of documents was laid to rest by this court in *Braswell v. United States*, 487 U.S. 99 (1988). The Court in *Braswell* reiterated that the contents of subpoenaed documents are unprivileged. And then the Court, echoing Justice Scalia's point in *In re Sealed Case*, suggested that documents produced under immunity could nonetheless be tainted:

> [A] grant of production immunity can have *serious consequences*. Testimony obtained pursuant to a grant of statutory use immunity may be used neither *directly nor derivatively* [citing *Kastigar*]. "[O]ne raising a claim under the statute need only

34 *E.g.*, *Nix v. Williams*, 467 U.S. 431 (1984) (body); *United States v. Lee*, 699 F.2d 466, 468 (9th Cir. 1982) (murder weapon); 3 Wigmore, *Evidence*, "Fruits of Poisonous Tree" § 859, at 557 n.7 (1970), and cases there cited (other physical evidence).

35 The OIC and the Department of Justice rely on this Court's decision in *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549 (1990). In *Bouknight*, the issue was whether a mother, who had been granted custody of her son by the Department of Social Services, had a Fifth Amendment privilege to refuse to produce her child to the Department of Social Services on request. *Bouknight* did not involve immunity at all. It held that the Fifth Amendment did not apply to an order requiring a custodian to produce a child to the state protective services agency, relying on the "required records" exception to the Fifth Amendment. *See Shapiro v. United States*, 335 U.S. 1, 17-18 (1948).

> show that he testified under a grant of immunity in order to shift to the government the *heavy burden* of proving that all the evidence it proposes to use was derived from legitimate independent sources."

Id. at 117 (emphasis added) (quoting from *Kastigar*).[36]

These principles, expounded by *Kastigar* and confirmed by *Braswell*, are dispositive of this case. Use by the Office of Independent Counsel against Mr. Hubbell of documents whose very existence it compelled him to disclose under immunity, would violate *Kastigar*'s clear command that Mr. Hubbell is entitled to be left in the same position vis-à-vis criminal prosecution that he would have been in had he simply been allowed to assert his privilege.

The OIC, in effect, compelled Mr. Hubbell to tell it what incriminating documents he had. It compelled him to do this under immunity. And because he told the OIC truthfully what he had, and *only* because he did so, the OIC obtained the incriminating documents. It then concededly "used the information contained in those documents . . . to develop the various tax-related charges alleged in the indictment." OIC Br. at 3. This cannot be squared with the applicable law on immunity.

As this Court said in *Braswell*, immunity has "serious consequences." And as this Court said in another document subpoena case:

> The decision to seek use immunity necessarily involves a *balancing* of the Government's interest in obtaining

36 The OIC, in its brief, quotes from the dissent in *Braswell*, but ignores this language in the opinion of the Court.

> information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation.

Doe I, 465 U.S. at 616 (emphasis added).

The Office of Independent Counsel proceeded below heedless of these warnings. It did no balancing at all. It obtained the immunity order for the purpose of prosecuting the immunized witness. And because it conferred immunity at the beginning of the investigation, it did not even attempt to establish any "legitimate independent sources" for its evidence.

In the twenty-three years since *Fisher*, there are only two or three reported cases in which the Department of Justice has attempted to prosecute a person after compelling production of non-corporate documents under immunity.[37] And there are *no* cases in which the Department of Justice *began* its investigation by compelling a subject to produce documents under immunity and then indicted the subject. We submit that this is not a practice to be encouraged, and that in most cases — including this one — the immunity statute will not permit it.[38]

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37 *See United States v. Neely*, No. 94-5107, 1996 U.S. App. LEXIS 2106, at *29 n.9 (4th Cir. Feb. 13, 1996) (unpublished) (approving use of documents produced under immunity in narcotics and money laundering prosecution, without discussing *Kastigar*), *cert. denied*, 519 U.S. 861 (1996); *In re Steinberg*, 837 F. 2d 527, 530 (1st Cir. 1988) (rejecting argument that contents of documents could not be used because they were privileged under *Boyd v. United States*, 116 U.S. 616 (1886); *Kastigar* neither raised nor discussed).

38 Wigmore, in his famous treatise on the Fifth Amendment privilege, made this point forcefully:

> The privilege, together with the requirement of probable cause prior to prosecution, protects the individual from being prosecuted for crimes of insufficient notoriety or seriousness to be of real concern to society.
>
> The concern here is mainly with the "fishing expedition," with what under Elizabeth and James amounted to the unlawful process of poking about in the speculation of finding something chargeable.
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> * * * * *
>
> Each of us, after all, is a criminal more or less. But as to most of our crimes we are, practically speaking, the indispensable threshold witnesses . . . . it would be a frightening situation if the system were constructed so that the prosecutor had it within his power to select from all of the crimes of all of us the ones to pursue.
>
> The place to nip this specter may be in the bud — by depriving the state of authority to compel self-incriminatory disclosures . . . . Sometimes . . . in grand jury, legislative and administrative agency inquiries, where there is no probable-cause requirement, there is only the privilege against self-incrimination to perform this function.

8 Wigmore, *supra*, § 2251, at 314-15 (footnotes omitted). *See also Morrison v. Olson*, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting and quoting from Mr. Justice Jackson's (then Attorney General Jackson's) famous address to the United States Attorneys on April 1, 1940).

III. THE FOREGONE CONCLUSION EXCEPTION DOES NOT APPLY

The Office of Independent Counsel, at the end of its brief, also asks this Court to hold that Mr. Hubbell had no valid Fifth Amendment privilege in the first place. In support of this position, the Office of Independent Counsel argues that the existence and Mr. Hubbell's possession of the myriad documents called for by the subpoena were a "foregone conclusion" within the meaning of the *Fisher* case at the time the subpoena was served. The basis of the OIC's

argument is its contention that existence and possession of records by any person or businessman of the type sought in the subpoena are a "foregone conclusion." This argument is completely without merit.

The first problem with the Independent Counsel's argument is that it has been waived. The argument that the witness has no valid claim of privilege should be raised when the privilege is asserted. The OIC did not challenge Mr. Hubbell's assertion of the privilege then; instead, it accepted the claim and procured an immunity order compelling production. Later, when Mr. Hubbell moved to dismiss the indictment, the OIC conceded in the district court—deliberately, forcefully and repeatedly—that Mr. Hubbell had a valid Fifth Amendment privilege to decline to turn over any documents absent immunity. In its district court brief the OIC stated in the clearest possible terms that the Fifth Amendment *does* apply to a subpoena for "business records":

> *Doe* and *Fisher* make it clear that because of these three "testimonial aspects of production," an individual who receives a federal grand jury subpoena that commands him to produce *business records* may assert his Fifth Amendment privilege against self-incrimination.

R. 303 (emphasis added). The OIC went on to tell Judge Robertson:

> For the purposes of this motion there is no factual dispute. Moreover, the legal dispute is limited. Both parties agree an individual can respond to a subpoena commanding

> *business records* by asserting his privilege against self-incrimination.

R. 311-12 (emphasis added). The issue has been thoroughly waived; and it is a fact-bound issue on which there is no record.[39]

Second, the argument made by the OIC—that existence and possession of ordinary business and financial records are a foregone conclusion for any businessman—is the exact same argument that this Court rejected in *Doe I*. In *Doe I*, the Justice Department wrote in its brief to this Court:

> Where the documents sought are standard business records, the act of production generally does not rise to the level of testimonial self-incrimination. By producing such records, a sole proprietor may tacitly admit they exist and are in his possession. But since such documents are kept by virtually every business from the smallest family concern to the largest conglomerate, these tacit assertions "add[] little or nothing to the sum total of the Government's information" and are thus not sufficiently testimonial to implicate the Fifth Amendment. Furthermore, the fact that a sole proprietorship possesses the sort of documents maintained by virtually all businesses (as distinct from the contents of the document) is hardly incriminating.

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39 Since the court of appeals considered this issue anyway, this Court may of course choose to consider it too. There are, however, compelling reasons not to. For example, there will, of course, never be any record because of the conditional misdemeanor plea resolving the case below.

Govt's Br. in *Doe I* at 9. Instead of accepting this argument, the Court first noted that "[r]espondent did *not* concede in the District Court that the records listed in the subpoena actually existed or were in his possession," and then held that "[t]he act of producing the documents at issue in this case is privileged and cannot be compelled without a statutory grant of use immunity . . . ." 465 U.S. at 614 n.13, 617 (emphasis added).[40]

Third, the government's argument was rejected in *Doe I* for a good reason. The "foregone conclusion" exception is properly available only where the circumstances are such that the witness is not giving testimony about what documents he has. It is wrong to postulate that just because the government believes a witness to be a "businessman" the government no longer relies on his truthtelling in obtaining full compliance with a subpoena for some of his business records.

The point is made, simply, by reference to the subpoena in this case. When the OIC asked Mr. Hubbell to produce "[a]ny and all documents reflecting, referring or relating to any direct or indirect sources of money or other things of value received by or provided by Webster Hubbell, his wife, or children," J.A. 47, the OIC plainly had no idea whether he had one such document, ten, or several hundred. It had no idea whether any such documents that did exist consisted of bank deposit receipts, check stubs or took some completely different form. The OIC was entirely dependent on Mr. Hubbell's truthtelling for compliance. When the OIC asked Mr. Hubbell to produce "[a]ny and all documents reflecting, referring or relating to time worked or billed by Webster Hubbell," *id.*, it had no idea whether Mr. Hubbell

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40 The records sought in *Doe I* are indistinguishable from those sought here. *Compare Doe I*, 465 U.S. at 607 n.1, *with* the subpoena issued to Mr. Hubbell (J.A. 47-49).

maintained timesheets or kept no such records at all. And when it asked Mr. Hubbell to produce, for example, "[a]ny and all documents reflecting, referring or relating to any retainer agreements," J.A. 48, it had no idea whether there were any such documents, and if so, how many. The OIC relied completely on Mr. Hubbell's truthtelling to find out what documents Mr. Hubbell had. If there had been a "smoking gun" document, the OIC would have learned of its existence only from Mr. Hubbell's compliance. "Testimony" was clearly involved in complying with this subpoena, and the foregone conclusion standard was not satisfied.[41]

Finally, the Office of Independent Counsel's argument is based on a misreading of *Fisher*. The OIC assumes *Fisher*'s "foregone conclusion" holding rested on the nature of the documents subpoenaed there,[42] when in fact *Fisher*'s foregone conclusion holding rested on the fact that the existence and location of the records were undisputed. The parties in *Fisher* had agreed and stipulated that the

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41 To make matters worse for the OIC, Mr. Hubbell had been in jail for over a year when the subpoena was served. Thus, even if most businessmen have records, the same may not be said for records of a defunct business whose ex-proprietor has been in jail for a year.

42 The OIC says that "[b]ecause the subpoena in this case, like the subpoena in *Fisher*, called only for specified categories of ordinary business records, the decision in *Fisher* calls for the same conclusion here . . . ." OIC Br. at 33-34. This statement is also factually incorrect. The summonses in *Fisher* were *far* narrower than the subpoena here. The subpoena here is, however, almost the same as the subpoena at issue in *Doe I* that is described in detail in the opinion, 465 U.S. at 607 n.1; and in *Doe I* the government's foregone conclusion argument was rejected. So *if* the foregone conclusion argument did turn simply on the nature of the subpoenaed documents, which it does not, this Court's decisions would still be fatal to the OIC's position.

documents had been created by the accountants and transferred to the attorney.[43]

Every single lower court to consider the issue has correctly understood the foregone conclusion issue to turn on the degree of knowledge by the government regarding the existence and witness's possession of the documents.[44] The

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[43] The Office of Independent Counsel understands this perfectly well. In its brief below, the OIC told the court of appeals that *Fisher* "held that the existence of documents whose existence had been *stipulated* by the taxpayer was a 'foregone conclusion.'" App. Br. at 43 (emphasis added). The stipulation is found at *United States v. Fisher*, 500 F.2d 683, 685 (3d Cir. 1974).

[44] *See In re Grand Jury Subpoena Duces Tecum Dated Oct. 29, 1992*, 1 F.3d 87 (2d Cir. 1993) (where defendant had testified before SEC as to possession of diary, and had previously provided a copy which the government suspected had been altered, subpoena for original does not implicate the Fifth Amendment); *In re Steinberg*, 837 F.2d 527 (1st Cir. 1988) (where government witness had testified as to existence and contents of specific notebooks sought by subpoena, subpoena does not implicate the Fifth Amendment); *United States v. Clark*, 847 F.2d 1467 (10th Cir. 1988) (finding existence of accountants' work papers, which were known to have been given to taxpayer's attorney, to be a foregone conclusion); *United States v. Rue*, 819 F.2d 1488 (8th Cir. 1987) (some subpoenaed documents had previously been shown to and reviewed by IRS agent, and existence of remainder had been acknowledged); *In re Grand Jury Proceedings on Feb. 4, 1982*, 759 F.2d 1418 (9th Cir. 1985) (act of producing documents in response to extremely broad subpoena held to be testimonial); *United States v. Fox*, 721 F.2d 32 (2d Cir. 1983) (act of producing documents in response to broad subpoena seeking a wide range of personal financial and business records held privileged); *United States v. Schlansky*, 709 F.2d 1079 (6th Cir. 1983) (act of producing documents in response to highly specific subpoena reflecting detailed knowledge of requested documents held not to be privileged where existence and possession were not in dispute); *In re Katz*, 623 F.2d 122 (2d Cir. 1980) (privilege upheld where government failed to make particularized showing that existence of business records was a foregone conclusion); *United States v. Praetorius*, 622 F.2d 1054 (2d Cir. 1979) (act of producing passport not privileged where existence and location were not in question), *cert. denied sub nom. Leber v. United States*, 449 U.S. 860 (1980).

reasonable particularity standard has been adopted by the Second Circuit, and now by the D.C. Circuit.[45] It has worked well in the Second Circuit. The government has been able to overcome the privilege in several cases where, instead of issuing a broad subpoena at the beginning of its investigation, it issued a narrow one after developing specific and conclusive evidence regarding recordkeeping at a particular business establishment.[46]

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[45] *See, e.g., In re Grand Jury Subpoena Duces Tecum Dated Oct. 29, 1992*, 1 F.3d 87 (2d Cir. 1993). The First Circuit has suggested that the government must establish "no doubt" that the item exists. *United States v. Anello*, 705 F.2d 253 (1st Cir. 1985). *See also* Wayne R. LaFave, Jerold H. Israel, & Nancy J. King, 3 *Criminal Procedure* 2d § 8.13, at 262-63 (1999).

[46] *See, e.g., In re Grand Jury*, 1 F.3d 87; *United States v. Walker*, 982 F. Supp. 288 (S.D.N.Y. 1997) (witness' former employee told government of existence of subpoenaed records); *In re Grand Jury Subpoena Duces Tecum Dated Nov. 13, 1984*, 616 F. Supp. 1159 (E.D.N.Y. 1985) (government submitted affidavit demonstrating particularized knowledge).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

John W. Nields, Jr.*
Laura S. Shores
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

**Counsel of Record*

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